

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 30TH JULY 2007 / 8TH SRAVANA 1929

CRL.A.No. 1116 of 2007()

SC.989/2003 of ADDL. SESSIONS JUDGE (ABKARI CASES) KOTTARAKKARA
CP.37/2002 of JUDL.MAGISTRATE OF FIRST CLASS-I, PUNALUR
.....

APPELLANT: APPELLANT

MONACHAN, S/O. MATHAI,
C.NO.1596, CENTRAL PRISON,
TRIVANDRUM.

BY ADV. G.G.MANOJ[STATE BRIEF]

RESPONDENTS: RESPONDENT

STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR OF THE
HON'BLE HIGH COURT OF KERALA AT ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. PUZHAKKARA MUHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 30.07.2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NO.1116 OF 2007

Dated this the 30th day of July, 2007.

JUDGMENT

The accused in S.C.No.989/2003 on the file of the Additional Sessions Judge (Abkari Cases), Kottarakkara, is the appellant. He faced trial for the offences punishable under Section 55 (a) read with Section 8(1) and 8(2) of the Abkari Act on the allegation that he was found in possession of 1.5 liters of arrack and engaged in selling the same at 3.50 a.m on 24.2.2002 within the limits of Yeroor Police Station near Andannoor Bhagavathy Temple in Ayiranalloor village and thereby committed the said offence. To prove the charge against the appellant, prosecution examined Pws 1 to 5 and relied on Exts.P1 to P5. MO1 was also produced before the court. After closing the prosecution evidence, the appellant was questioned under Section 313 of the Code of Criminal Procedure. He denied the prosecution allegation and had stated that while he was engaged in playing cards, he was arrested from the festival compound and he has not committed the offence as alleged by the prosecution. However, relying on the evidence adduced by the prosecution, the trial court found that the appellant committed the offences punishable

under Section 55(a) read with Section 8(1) and 8(2) of the Abkari Act and he was found guilty thereunder and sentenced to undergo S.I for two years and to pay a fine of Rs. One lakh with default sentence of payment of fine to undergo S.I for three months more. The appellant was also given the benefit of Section 428 of the Code of Criminal Procedure.

2. This appeal is filed through the jail authorities and since the appellant is not having a counsel of his own choice, a member from the State brief panel has been appointed to argue the case for and on behalf of the appellant. Heard the learned counsel appearing for the appellant as well as the Public Prosecutor. The learned counsel appearing for the appellant submits that the judgment of the trial court legally or factually is not sustainable. The counsel further submits that the trial court had committed a serious error in placing reliance on the evidence of Pws 3 and 4, the Police Officials, to find that the appellant was in possession of 1.5 liters of arrack as alleged by the prosecution since independent witnesses Pws 1 and 2 had not supported the prosecution case at all. Further the counsel submits that PW4 while detecting the offence did not comply with the provisions of Kerala Excise Manual as well as the Abkari Act and while

he was taking the sample for analysis. Lastly, the counsel submits that the evidence of PW4 regarding seizure of MO1 and taking of the sample for analysis have not been supported by any other evidence and as the prosecution has not offered any explanation for the delay in producing the contraband and the sample, so as to rule out the chance for substitution of the contraband and the sample and that has not been proved by the prosecution. Hence, the judgment of the trial court is not in accordance with the principles laid down by this Court in the judgment reported **Narayani v. Excise Inspector** (2002 (3) KLT 725).

3. The trial court relied on the evidence of Pws 3,4 and 5, who were the police officials, out of whom PW4 is the Sub Inspector of Police, who detected the crime and filed the final charge before the court. PW3 was the head constable, who accompanied Pw 4 at the time of detection of the offence. PW4 had given evidence before the court that while he was in the station on 24.2.2002, he got a phone message to the effect that the appellant was engaged in selling arrack near the festival compound of Aandannoor Bhagavathy Temple. On getting that information, he went to the temple compound along with PW3 and he had seen that the appellant was holding MO1

plastic can and on seeing the police party, the appellant thrown away the glass and he put down the MO1 can and on further examination it was found that the can contained about 1.5 liters of arrack. This witness has further stated that the appellant was questioned and MO1 can was seized as per Ext.P1 mahazar in the presence of the independent witnesses. This witness has further stated that he had taken the sample from MO1 for analysis. The evidence of this witness has been supported by PW3, the head constable, who accompanied PW4. However, the question to be considered is whether the evidence of these two witnesses could be believed to hold that the appellant was found in possession of MO1 jerry can which contained 1.5 liters of arrack as alleged by the prosecution. PW4 was cross examined by the defence and the definite case of PW4 was that he had got information that the appellant was selling arrack near the festival compound but this witness has not given any evidence regarding the information which he had got about selling of arrack by the appellant. Further, either PW4 or PW5 had not given any satisfactory explanation for the delay caused in producing MO1 and the sample before the court as it is seen from Ext.P4 thondi list that MO1 and the sample were produced only on 13.3.2002 whereas, the crime was detected on 24.2.2002.

Though a specific question was put to PW5 about the delay occurred in producing MO1 before the court, he had not given any explanation but, only said that he was not aware how the delay was occurred. With the above background, this Court has to consider the evidence of Pws 1 and 2, who were examined as occurrence witnesses. Pws 1 and 2 were specific in their evidence that they were not seen the appellant selling arrack or MO1 was seized from the appellant by the Sub Inspector. Though these witnesses were signed the mahazar, they have stated that they have not seen the Sub Inspector seizing of MO1 from the appellant. Apart from the evidence of these witnesses, it is to be noted when MO1 was produced before the court and verified in the court, that the seal or label alleged to have been put by PW4 at the time of detection of the offence were not seen on MO1. Coupled with the evidence of Pws 1 and 2 and the fact that MO1 did not contain any seal or label create doubt on the evidence of Pws 3 and 4 regarding seizure of MO1 from the appellant. Apart from the above infirmity, the prosecution had not explained the delay caused in producing MO1 before the court. As per the dictum laid down by this Court in **Narayani's** case (cited supra), it is the duty of the prosecution to give explanation that the sample and the contraband were kept in

safe custody till they produced before the court and the prosecution had to rule out any possibility of substitution of the same. In the light of the fact that MO1 did not contain any label or seal and non explanation of the delay caused in producing the same and also the case suggested by the appellant when he was questioned under Section 313 of the Code that he was arrested from the temple compound while he was playing cards create reasonable doubt regarding the prosecution case that MO1 which contained 1.5 liters of arrack has been seized from the appellant. The benefit of doubt has to be given to the appellant. Apart from the above infirmity in the evidence of Pws 3 and 4 regarding seizure of MO1 and production of the same before the court, the trial court had not put the contents of Ext.P5 report of the chemical analyst to the appellant when he was questioned under Section 313. This is an infraction of the right of an accused available under Section 313.

Considering all these aspects and failure of the prosecution to prove the case beyond reasonable doubt against the appellant, the judgment of the trial court is not legally sustainable. Accordingly, the judgment of the trial court is set aside and the appellant is acquitted of all the charges. Consequently, the appeal is allowed.

The appellant/accused in S.C.No.989/2003 on the file of the Additional Sessions Judge (Abkari Cases), Kottarakkara, shall be released forthwith, if he is not required to be kept in jail in connection with any other case.

K. THANKAPPAN, JUDGE.

cl

K. THANKAPPAN, J.

CRL.A.NO.1116 OF 2007

JUDGMENT

30th day of July, 2007.